No. 15084

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. F. SHUCK CONSTRUCTION COMPANY, INC.; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; THE SEATTLE CONSTRUCTION COUNCIL; and HOD CARRIERS' BUILDING AND COMMON LABORERS' UNION, LOCAL No. 242, AFL,
Respondents.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-PETITION FOR REVIEW OF SAID ORDER

BRIEF OF RESPONDENT, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.

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& LYLE L. IVERSEN,
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Office and Post Office Address:
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I. JURISDICTION

This matter is before the Court both upon the Board's Petition for Enforcement and the Petition of Associated General Contractors, Seattle Chapter, Inc., for Review of the Board's Order.

The jurisdiction of this Court to review the order

of the National Labor Relations Board is founded upon Paragraph f of Section 160, Title 29, United States Code.

II. ADDITIONAL STATEMENT OF THE CASE

The Associated General Contractors, Seattle Chaper, Inc., and the Seattle Construction Council are one and the same (A. 47), the Seattle Construction Council being merely a name by which a portion of the activities of Seattle Chapter, Inc., are carried on. Hence, hereafter in this brief, we shall refer to Associated General Contractors, Seattle Chapter, Inc., as AGC and shall not make separate reference to Seattle Construction Council, but it may be understood that our use of the term AGC will include both Seattle Chapter, Inc., and its activity, Seattle Construction Council.

The corporate defendant, E. F. Shuck Construction Co., Inc., was not at any time material to this case, a member of AGC (R241, 242). Mr. E. F. Shuck, personally, who was an officer of E. F. Shuck Construction Co., Inc., was a member of AGC, but the corporation had never been admitted to membership (R230). In order to become a member, board action by the AGC was necessary and such action had never occurred with respect to E. F. Shuck Construction Co., Inc. (R241).

The Labor Agreement under consideration, was

entered into November 3, 1950 (R205) and was signed on behalf of AGC by a committee of its members, namely Cliff Mortensen, George E. Teufel, R. B. Lane, Oscar Sundberg, and E. B. Hickok (R209). There is no showing that AGC had any further connection with the carrying out of the agreement or operations under the agreement subsequent to its being entered into. The AGC did not act as a hiring agent for any persons who worked on the job in question, nor did it have any contractual relations with any persons who worked on the job (R231). Neither did it have any contractual relationship with E. F. Shuck Construction Co., Inc. (R232). The AGC is a service organization for its members (R229). There is no showing or finding that it assumed any liability for the wages of employees of its members or participates in any way in hiring, paying, discharging or directing its members' employees.

The job in question was a local one for a school district of the State of Washington (R240), and there is no showing or finding that it affected commerce in any way. There is nothing in the record to show what, if any, proportion of the materials used on the job involved in this proceeding came across the state lines, and there is nothing in the record to indicate that the individual complainant, Richard B. Kieburtz, was or might have been employed in

connection with any work done or to be done by E. F. Shuck Construction Co., Inc., in connection with commerce, or in any manner other than on the local school job. There is no showing or finding that there was any continuity of personnel in employment between the local school job and any jobs affecting commerce which E. F. Shuck Construction Co., Inc., did nor is there any showing or finding that there was any such connection that conditions on the local job in any manner affected any of the jobs relating to commerce.

The AGC itself is a corporate entity separate from its members (R229). There is no evidence that the AGC itself employs any persons in commerce or carries on construction or selling work affecting commerce or buys materials crossing state lines in any quantities whatsoever.

(a) The questions involved in this case are as follows:

(1) Does one who acts as agent for an employer in collective bargaining thereby assume personal liability for back pay to employees held to be discriminated against by the manner in which the employer applies the contract?

This question is raised in this case by the assessment against AGC of reparations to complainant, Kieburtz, by Section 2 of the order of the National Labor Relations Board, particularly Subsection (b) (1) thereof (R62).

(2) May a charge be filed against an agent who negotiated a contract, based upon an alleged discrimination which occurs at any time in the future so long as the contract remains in effect?

This question arises by reason of the fact that the order of the National Labor Relations Board assessing reparations against AGC (R61) is based upon an alleged discrimination against employee, Kieburtz, occurring more than six months after the contract was negotiated, as shown in Paragraphs IX, X and XII of the complaint (R4 and 5), with no more participation shown on the part of AGC than that the contract was still in effect (R82-84).

(3) Does an incorporated association become an "employer," as that term is defined in the National Labor Relations Act, solely by reason of the fact that some of its members are "employers" engaged in commerce?

This question arises because the findings of the National Labor Relations Board hold that AGC falls within the Board's jurisdiction (R56 and 57), and is subject to the liabilities for an "employer," but the Board's jurisdiction to assess reparations for unfair labor practices extends only to "employers" as defined in the act, and the authority of the Board extends only to matters affecting commerce.

III. SPECIFICATION OF ERRORS

The National Labor Relations Board erred in the following respects:

(1) In holding that AGC is subject to the jurisdiction of the National Labor Relations Board and was an "employer engaged in interstate commerce" within the meaning of the National Labor Relations Act.

(2) In not dismissing the action as to AGC because of its not being commenced within the time limited by law, particularly Section 10 (b) of the National Labor Relations Act (29 U. S. C. 160), which provides, among other things, as follows:

> "Provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event, a six-months' period shall be computed from the date of his discharge. * * *"

(3) In finding that the alleged unfair labor practice affected commerce.

(4) In finding that this respondent engaged in any unfair labor practice.

(5) In assessing reparations against this respondent.

(6) In requiring this respondent to post certain notices on premises to which it has no access.

(7) In not dismissing the action as to AGC.

IV. ARGUMENT

In this case, the court has before it a petition for enforcement filed by the National Labor Relations Board, and also a Petition for Review filed on behalf of AGC. The issues raised by the two petitions are identical, consequently we shall discuss these issues together.

(a) AGC Is Not Liable for Reparations

The crucial issue in this case is the status of one who participates as an agent in collective bargaining. The complaint against the AGC in this case is based solely upon the fact that it acted as the agent for a group of employers in negotiating the contract under which the alleged discrimination was held to have taken place.

The implications of attempting to hold the negotiator of a contract liable for all the acts of those parties for whose benefit it was negotiated are so dangerous that if established, it would make industry-wide bargaining too perilous for anyone to undertake. The National Labor Relations Board in this case has undertaken to assess against AGC reparations for back wages due employee, Kieburtz (R62). There was no express finding that the AGC is an "employer" within the meaning of the act, but such a finding is implied in the order, since the only right of the Board with respect to such assessment

of reparations, is derived from Section 10 (c) of the National Labor Relations Act (U. S. C. A. Title 29, Section 160) in the following language:

> "If upon preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person, an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay as shall effectuate the policies of this sub-chapter; provided that where an order directs reinstatement of an employee, back pay may be required *of the employer or labor organization,* as the case may be, responsible for the discrimination suffered by him * * *" (Emphasis supplied)

It will be noted that under the act only an "employer" or a labor organization may be held for the *back pay* of one discriminated against. The act does not justify assessing the liabilities of an employer against an agent such as the AGC in this case.

It is apparently the contention of the Government that any agent of an employer becomes itself an employer for all purposes and subject to all of the obligations of an employer. The Government derives this contention from the definition contained in Section 2 (2) of the National Labor Relations Act, Title 29 U. S. C. Section 152, which reads as follows:

> "The term 'employer' *includes* any person acting as an agent of an employer, directly or

> indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (Emphasis supplied)

A careful examination of this provision of the act will demonstrate that it does not have the effect that counsel for the Government contend. The definition of employer does not undertake to change that word from its ordinary meaning. In other words, the term employer is not given a special definition, but is only held to *include* an agent. Since the meaning of the term employer is not varied by the definition, it takes its ordinary meaning. *U. S. v. Cooper Corp.,* 312 U. S. 600, 85 L. Ed. 1071; *Deputy v. Dupont,* 308 U. S. 488, 84 L. Ed. 416. To be an employer, one must employ persons. Funk & Wagnall's New Standard Dictionary defines Employer as: "One who employs; one who uses or engages the services of other persons for pay." AGC does not come within this definition.

The effect of the statement in the statute that the term "employer" shall include an agent is to make an employer liable for the acts of the agent. That is

the only effect of that section of the statute. The act was never intended to cast the liability of employers *in toto* upon their mere agents.

If the Government's contention is correct and if every agent of the employer which participated in any way directly or indirectly in the making of the contract is an employer, we have no stopping place as to the extent of the liability. Thus, in this case, if the Government is correct, not only is the AGC an employer liable for the back pay, but we presume that it would be within the province of the National Labor Relations Board to hold also that the individual members of the committee, namely, Cliff Mortensen, George T. Teufel, R. B. Lane, Oscar Sundberg and E. B. Hickok, who signed the labor contract (R209), could be, each individually, employers and liable for the full amount of the reparations. Likewise, if the Government is correct, the attorney who drafted the agreement and the stenographer who typed it and the messenger boy who delivered it, are each agents of the employers, and are liable for the reparations. Carried to its logical conclusion, the contention reduces itself to an absurdity. If every agent of the employers participating directly or indirectly in the negotiation of this contract, is an employer and liable for the back pay, then those actually named as respondents would be entitled to contribution from all other agents of the

the result of negotiation of the contract and the joint and several liability should be distributed more employer who contributed directly or indirectly to broadly. The mere statement of this proposition, carries with it its own refutation. We submit that the liabilities of an employer are cast only upon those who employ persons, although the term is broad enough to make the employer liable for conditions brought about by acts of his agents and agents may be restrained from doing on behalf of an employer acts constituting or contributing to an unfair labor practice.

The language of Section 2 (2) of the National Labor Relations Act in defining the word employer, does not either literally or by intent confer pecuniary liability for an employers' acts upon all of the agents who participate in them. The Supreme Court of the United States in the case of *Packard Motor Car Company v. National Labor Relations Board,* 330 U. S. 485, 91 L. Ed. 1040, stated that the purpose of this definition is merely to apply the rule of *respondeat superior* in cases under the National Labor Relations Act. It is implicit in Section 2 of the National Labor Relations Act that the intent is to make the principal liable for the acts of an agent, thus subsection (13) of Section 2 (29 in U. S. C. 152) reads:

> "In determining whether any person is acting as an agent of another person so as to make

such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified, shall not be controlling."

The language of the Supreme Court of the United States in *Packard Motor Car Company v. National Labor Relations Board,* 330 U. S. 485, 91 L. Ed. 1040, found on Page 485 of the official reports and Page 1049 Law Edition in explaining the purpose of the definition of employer found in Section 2 (2) is as follows:

> "The purpose of Section 2 (2) seems obviously to render employers responsible in labor practices for acts of persons performed in their interests. It is an adaptation of the ancient maxim of the common law, *respondeat superior,* by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants. Even without special statutory provisions the rule would apply to many relations. But Congress was creating a new class of wrongful acts to be known as unfair labor practices, and it could not be certain that the courts would apply the tort rule of *respondeat superior* to those derelictions. Even if it did, the problem of proof as applied to this kind of wrongs might easily be complicated by questions as to the actor's scope of authority and of variance between his apparent and his real authority. Hence, it was provided that in administering this act the employer for its purposes should be not merely the individual or corporation which was the employing entity, but also others whether employee or not, who are 'acting in the interest of an employer'."

In the case from which we have just quoted, the Supreme Court held that foremen who came tech-

nically within the description of agents of the employer, were not thereby rendered "employers" to the point that they could not form a union. The Supreme Court thereby recognized the principle that the words of inclusion contained in Section 2 (2) of the National Labor Relations Act do not confer all of the attributes of an employer for all purposes upon an agent, but only have the effect of making the principal liable for the acts of the agents.

In the present case, there is no evidence that the AGC hired, fired, supervised, employed, paid or became liable for the payment of any persons employed pursuant to the contract. AGC was not an employer in the ordinary, dictionary sense of that term. It assumed no contractual relation to pay wages to Kieburtz or to anyone else employed under the contract, nor did it do the hiring or the firing or stand in the position of the one to whom workers looked for payment or direction (R231). In other words, in the ordinary sense, AGC was not an employer. Under Section 10 (a) of the National Labor Relations Act (29 U. S. C. Section 160) the National Labor Relations Board is empowered to prevent any "person" from engaging in any unfair labor practice affecting commerce. We would not contend that the AGC under proper facts might not be enjoined from continuing to engage in an unfair labor practice, but this is a far different thing from say-

ing that it, as an agent, has the obligations of an employer to make payments of back pay to one who is wrongfully discharged. AGC is subject to such jurisdiction as the Board has over "persons," but not the obligations which the law places upon "employers," although its act can result in liability upon the part of an employer by reason of its agency.

The only really important issue in this case is that of financial liability upon the part of those acting as agents for employers for collective bargaining purposes, since the case has now become moot as to everything else. The contract which was deemed to be in violation of the National Labor Relations Act, expired December 31, 1953 (R84). The particular job in question was completed long ago and the employment of complainant Kieburtz would have ended in any event in October of 1953 (R25). The only thing that is not moot is the matter of back pay. It is important that the status of negotiators on behalf of employers be cleared up. We submit that the AGC in this case is not liable for the back pay. Neither it nor the individual members of the committee under any of the rules of agency are liable for pay or back pay to this individual.

This case is to be distinguished from the decision of this court in the case of *National Labor Relations Board v. Waterfront Employers' Association,* 211 F. (2d) 946, since in that case, the Waterfront Em-

ployers' Association was actually the paymaster for the employers and actually stood in the relation of employer to the employees. This is not the case here where the sole connection of the AGC was in negotiating the original contract.

The AGC is not an employer since it does not employ any of the people affected by the contract and has no contractual relations with them and cannot be charged with the financial obligations to them of their employers. The National Labor Relations Board was in error in holding the AGC liable for the back pay awarded Kieburtz.

(b) The Procedure Was Not Commenced Within the Time Limited by Law.

The National Labor Relations Board has undertaken to hold AGC liable for an unfair labor practice upon the basis of a contract which they negotiated in November of 1950 (R205 to 209). There was no showing made by the Government that the Associated General Contractors had done anything in connection with that contract subsequent to the time of its negotiation. AGC merely acted as the convenient representative of its employer members to negotiate and sign an industry-wide agreement (R205, Page 1, Ex. 2). It does not employ any persons pursuant to the contract (R231), nor does it discharge any persons, and under the contract, it did not be-

come responsible for payment of any wages to the employees.

Section 10 (b) of the National Labor Relations Act (29 U. S. C. 160) provides in part:

> "Provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom the charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event, the six months' period shall be computed from the day of his discharge."

If the Associated General Contractors performed any act which violated the National Labor Relations Act, it could have only done so in the negotiation of the contract. That negotiation was concluded nearly three years prior to the filing of the charge (R205) in this case and is, therefore, barred by the section of the statute just quoted. In order to impose liability under the National Labor Relations Act, as in any other case, the facts constituting the violation must be proved. No proof has been adduced by the Government in this case to indicate that the AGC did anything whatsoever within the six months' period prior to the filing of the charge. The findings of the Board stated (R58):

> "We further find, as did the trial examiner in the original proceeding, that as the discrimination found herein stemmed from a contractual relationship between Shuck and the Union and because the contract was the product of

> negotiations between the Associated General Contractors and the Seattle Construction Council on the one hand, and the Union on the other, that the Associated General Contractors and the Seattle Construction Council discriminated in regard to hire and tenure of "employment of Kieburtz to the same extent as Shuck, thus encouraging membership in the Union, and thereby violating Section 8 (a) (3) of the Act."

There is no finding, and there was *no evidence* to support any contention that the AGC *did anything* subsequent to the time that the contract was negotiated with respect to carrying it out, enforcing it or keeping it in effect, although the examiner in his third conclusion of law (R26) stated:

> "By enforcing the unlawful provisions of the November 1950 contract, thus causing a discrimination in regard to the hire and tenure of employment of Richard B. Kieburtz, respondent Shuck, respondent General Contractors, and respondent Construction Council have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act."

There was absolutely *no evidence* to support the conclusion that the AGC did anything to enforce the contract. The Government offered no proof that any enforcement by the AGC had occurred, and consequently no evidence was offered to rebut any such claim. Had such contention been advanced at the hearing, the AGC could have shown that their members had been repeatedly advised by them that the Union Security Clause of the contract should

not be applied in cases where there was any likelihood that commerce was affected.

It was not incumbent upon AGC to negative contentions not advanced, and consequently evidence of their actual conduct with respect to the contract is not in the record. However, neither is there any evidence in the record to support any contention that within the six months prior to the filing of the charge, AGC enforced the provision, carried it out, or retained it in effect in any case where commerce was involved. In this respect, this case differs from the case of *NLRB v. Water Front Employers' Association,* 211 F. (2d) 946, in which it was admitted that the association had participated in the enforcement of the agreement. The mere fact of the negotiation of a contract does not per se establish that the agent carrying on the negotiations thereafter enforced it or carried it out. There is no evidence in this case that the AGC had any knowledge whatsoever of the application of the Union Security Clause in any case involving commerce or particularly in the case of Kieburtz, or that it did anything within the six months' period upon which any action against it might be predicated.

Since any act performed by AGC which might have constituted an unfair labor practice occurred more than six months prior to the filing of the charge, the complaint should have been dismissed

pursuant to the terms of Section 10 (b) of the National Labor Relations Act.

(c) There Is No Evidence That Commerce Was Affected

In order for the National Labor Relations Board to have jurisdiction, there must be an unfair labor practice affecting commerce. This is the requirement of Section 10 (a) of the Act. (U. S. C. Title 29, Section 160). The opening sentence of that section reads:

> "The Board is empowered as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in Section 8) *affecting commerce.* * * *" (Emphasis supplied)

There was no evidence to sustain any finding that commerce was involved. Neither was there any finding that AGC was so associated with commerce that its every act affects commerce. *No member of the AGC is involved in this proceeding.* The respondent named in the complaint, E. F. Shuck Construction Co., Inc., was not a member of AGC (R230, 231 and 241). E. F. Shuck, as an individual, was a member of AGC, but he was only an officer in the corporation (R245). There is no complaint in this case against E. F. Shuck as an individual. The AGC had no contractual relationship as to membership with the employer on the job in question (R231). Notwithstanding the easy disposition of this point by the Board in simply saying that the failure to

change the name from that of Mr. Shuck as an individual to that of E. F. Shuck Construction Co., Inc., was a minor disparity (R49), nevertheless the evidence was uncontradicted that a change in membership from that of an individual to a corporation required action of the Board of AGC and such action had not occurred (R241). The mere fact that the corporation paid the dues of Mr. E. F. Shuck in the AGC did not make the corporation a member any more than does the fact that an employer might pay the dues of an employee in the Chamber of Commerce, make the employer, as distinguished from the employee, a member of the Chamber of Commerce. There is no evidence upon which any claim can be made that AGC is bound by the actions of nonmembers who may elect to act under contracts which it has negotiated. It is probably true that most contractors in the Seattle area do conform to contracts negotiated for the industry, but this is only a matter of their convenience in getting along with the labor organizations. The difference between E. F. Shuck, Sr., as an individual, and E. F. Shuck Construction Co., Inc., a corporation, is much more than a difference in name. These are actually separate entities. This is not a matter merely of the manner in which a name is listed on a roster. It is not merely a matter of changing a name, but a matter of changing the actual member from Mr. Shuck

to the corporation, which was separate and distinct from the man.

Since there is no contractual relationship between AGC and the corporation, E. F. Shuck Construction Co., Inc., AGC cannot be held liable for the manner in which the corporation applied the contract which had been negotiated. Neither can it be said that AGC was applying or enforcing the contract on this job, nor can the job upon which Kieburtz was employed be held to affect commerce by reason of any connection of Shuck with commerce through association with the AGC.

The job involved in the discharge of Kieburtz was completely a local operation, namely the building of a schoolhouse (R240). No evidence was brought out to indicate that there was any integration of the jobs of Shuck Construction Co., Inc., to make those other jobs related, in any manner, to the school job, so that construction on the school job affected commerce. We submit that a corporation, like any individual, may be associated with commerce at one time and not associated with it at another. To illustrate, we seriously doubt that the court would hold that a housemaid, hired to perform domestic service in the home of a man who worked in commerce, would be considered within the terms of the National Labor Relations Act. In other words, for commerce to be affected, there must be such a re-

lation that the employment in question would have some effect on commerce. If such is the case in the present instance, there was no showing of that kind in the evidence. The evidence indicated that Kieburtz was employed for the sole purpose of doing extra work on the local school job. The evidence does not indicate that the job upon which he was employed was an instrumentality or channel of interstate or foreign commerce, neither was it a part of a utility or transit system. No evidence was introduced to show that this job which was separately bid, operated as an integral part of any interstate or foreign operation of Shuck Construction Co., Inc. The evidence does not indicate even that the same employees who were concerned with this job, were also concerned with any job affecting commerce, or that there was any other connection. There was no evidence that the enterprise employing Kieburtz produced goods for shipment outside of the state, or that it furnished services to an operation over which the Board exercised jurisdiction. The school which was under construction is in no way concerned with commerce and is a prime example of a local operation. There was no evidence that national defense was affected nor was there any evidence that any substantial amount of the material used in the construction job in question passed in interstate or foreign commerce. All the usual tests to determine

whether commerce was affected, may be applied and no proof will be found to establish that the requisite condition exists. The evidence will show that Shuck Construction Co., Inc., was engaged in a separate and distinct operation, in no way concerned with its other jobs, and the job itself was entirely a local intrastate activity.

With respect to AGC, the proof merely showed that some of its members are engaged in interstate and foreign commerce but there was no showing that AGC itself was so engaged or that the engagement of its members in interstate or foreign commerce in any manner, affected the school job of E. F. Shuck Construction Co., Inc. The position of AGC was simply that of a negotiator for its members. It should be borne in mind that it has members which do not engage in commerce, as well as members which do. The AGC is a separate corporate entity (R229). It is, therefore, not identical with its members. It had as much right to act as negotiator on behalf of those who do not engage in commerce as for those who are so engaged, and we submit that it was perfectly in order for the AGC to negotiate a contract which would be appropriate to either class of members. That is exactly what was done in this case. The express recognition of the fact that the National Labor Relations Act would apply to some sections of the contract, and under some cir-

cumstances, would make portions of it inapplicable, is shown by the inclusion of Section 11 of the contract, which provided (R208):

> "If any section, subsection, clause, sentence or phrase of this agreement is, for any reason, held to be repugnant to or in conflict with or in violation of the Labor-Management Relations Act of 1947, otherwise known as the Taft-Hartley Labor Act, being 29 U. S. C., 141 *et seq.*, such repugnancy, conflict or violation shall not affect the validity of the remaining portions of this agreement, and all portions thereof not repugnant to or in conflict with or in violation of said Labor-Management Relations Act of 1947 shall be enforced and abided by as herein written."

By this section, none of these portions in conflict with the National Labor Relations Act would be carried out. The Board in determining that this provision of the contract is illegal, overlooked a fundamental principle applicable to the interpretation of contracts. That principle is that a contract means what the parties intend it to mean as shown by the language used:

> "Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Whatever may be the inaccuracy of expression or the ineptness of words used in an instrument in a legal view if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly." 12 Am. Jur. 745.

This contract must be read as a whole and its inten-

tion ascertained from the entire instrument. It must be perfectly obvious that the insertion of Section 11 showed that the parties were perfectly cognizant of the Labor-Management Relations Act of 1947 and contracted in accordance therewith. It is a fundamental principle of law that existing statutes are read into any contract.

> "It is commonly said that the existing statutes in the settled law of the land at the time a contract is made, becomes a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention. This rule is elaborated to the effect that the laws which exist at the time and place of making a contract and at the place where it is to be performed effecting its validity, construction, discharge and enforcement, enter into and form a part of it as if they were expressly referred to or incorporated in its terms." 12 Am. Jur. 769.

The parties who negotiated this contract understood that parts of it which were in conflict with the Labor-Management Relations Act of 1947 were void and unenforceable insofar as they applied to operations affecting commerce, and Section 11 of the contract shows that they contracted accordingly. The implications of the contract are as much a part of it as though they were expressly written into the language.

It is clearly implied in this case that the contract negotiated by AGC was not to be applied in cases where it was contrary to the Labor-Management

Relations Act. It is perfectly within the language of Section 11 for the employers to hold the contract inapplicable in cases affecting commerce, and in fact, had that interpretation been placed upon the language, there would have been no charge of an unfair labor practice in this case. If there was any violation of the National Labor Relations Act in this case, it was in the application of the contract, not in its negotiation, and there is no liability on the part of AGC for the improper application of the contract by the corporate defendant, E. F. Shuck Construction Co., Inc., over which AGC had no control or, in fact, any contractual relation. In brief, the negotiation of the contract which was AGC's sole participation in the matter charged here was not in itself illegal, but AGC negotiated a contract on behalf of its members which it had a right to negotiate, and its participation in those negotiations cannot per se make its act illegal. There is no showing that the AGC paritcipated in any way in determining the actual manner in which the contract was applied in the case of Kieburtz.

The mere negotiation of a contract on behalf of members of an industry who were both in and out of commerce, which contract, if properly interpreted and applied, would not have resulted in any unfair labor practice within the meaning of the law, cannot be held the basis for financial liability on

the part of the AGC. Had this contract been interpreted to apply the Union Security Clause only to intrastate jobs, there would have been nothing illegal about it. It is only the manner in which it was applied that brought about any contended violation of the act. Since there is no proof that the AGC had anything to do with the manner in which it was applied, it was error on the part of the Board to find liability against the AGC.

(d) That Portion of the Order Dealing With the Posting of Notices Is Unreasonable.

The order of the Board includes a requirement that the AGC posts certain notices at all the jobsites for the E. F. Shuck Construction Co., Inc. (R61 and 62). AGC has no contractual relation with E. F. Shuck Construction Co., Inc., and has no authority to go upon the jobsites of E. F. Shuck Construction Co., Inc., for any purpose. If this order is to be carried out, the AGC will have to go upon sites where it has no right and the order requires it to maintain the signs for a period of sixty consecutive days. Of course the particular job in question was finished long ago, and what jobs or what personnel E. F. Shuck Construction Co., Inc., may now have, does not appear in the record. At least the contract which was involved in this matter has long ago gone out of existence. We submit that it is not reasonable to

require AGC to now undertake to post and maintain signs relating to this moot issue on jobsites where AGC has no right to go and over which it has no control. This is merely another illustration of the impossibility of attempting to impose the liability of employer upon a mere agent.

V. CONCLUSION

It was error for the Board to hold AGC liable for the back pay to Kieburtz, because the AGC was not Kieburtz's employer and Section 2 (2) of the National Labor Relations Act does not serve to place upon every agent of an employer the obligations of an employer with respect to back pay. The AGC itself was not an employer and did not participate in any way in the enforcement or application of the contract, but participated only as the negotiator on behalf of employers and the action of the AGC was completed more than three years prior to the alleged Unfair Labor Practice, and there is no showing that the AGC did anything whatsoever within six months of the time that the alleged unfair labor practice occurred. Likewise, the Government has not established its burden of proof that this local school job affected commerce or that the AGC was associated with the job or the employment of Kieburtz in any such manner as to cast a monetary burden upon AGC, particularly since the evidence

shows that the actual employer, E. F. Shuck Construction Co., Inc., was not even a member of AGC but was merely an employer following the contract negotiated for the industry, but without contractual relationship with AGC in that regard.

Respectfully submitted,

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